



Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

diversion



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John Barnes
Law Reform Commission of Canada

Working Paper 7

diversion

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Cat. No. J32-1/7-1974

Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Foreword

In developing more detailed proposals on the basis of *Principles of Sentencing and Disposition* (Working Paper No. 3) the Commission has already issued working papers on *Restitution* and *Compensation* (No. 5) and *Fines* (No. 6). The present working paper on Diversion has to be viewed in the context of these other papers.

The Commission has been engaged almost from its inception in exploring and developing the possibility of diversion and has conducted a major experiment which is described in the background volume, "*Studies on Diversion*".

An examination of Diversion and its place in the administration of criminal justice is necessary for several reasons. Too many forms of socially problematic behaviour have been absorbed by the criminal law in recent history and this trend needs to be reversed. One way of doing so is through the process of decriminalization—the elimination of offences. This approach unfortunately has not shown itself to be always successful. Even when offences are eliminated, problematic behaviour often remains, has to be dealt with, and may lead to the use of other charges. Diversion, in this context, represents an approach which recognizes that problems exist and cannot just be defined away but seeks solutions which minimize the involvement of the traditional adversary process and maximize conciliation and problem settlement. The full force of the criminal process can thus be restricted to offences which raise serious public concerns.

The working paper attempts to define the various stages of diversion in order to clarify where and when certain procedures may apply. It concentrates on the pre-trial stage where diversion can be developed as a formalized option. However, it does make the important point that there is a responsibility at each stage to justify the further use of the criminal process. The paper recognizes that behaviour such as fights within the family or between friends as well as certain property offences may or may not be defined as "criminal" depending on available solutions in the community. It also recognizes that the police serves many functions and that they too will define and process some forms of "crime" in the light of their own resources. In many ways the paper attempts to build on the best practices already in use and recommends that these practices be extended and legitimated as viable options in the administration of criminal justice.

In order to structure the process of diversion more formally and more concretely, three things are necessary. First, the practice of diversion needs to be extended and documented within the limits of the present legal framework. Secondly, the Commission is engaged in procedural studies in the pre-trial area, one of which, *Discovery* (Working Paper No. 4), has been completed but others are still in process. Thirdly, before recommending specific changes the Commission needs extensive feedback on the basic outline of Diversion as presented in this paper. Diversion, even more than other measures of disposition in criminal cases, depends on the understanding and cooperation of the public and we therefore urge the public to express its views to the Commission.

Diversion

1. Diversion: A Matter of Restraint

Most criminal incidents do not end up in the courts. Decisions by the victim or a by-stander not to call the police or the exercise of discretion by police not to lay charges, but to deal with the incident in another way, or a decision by the prosecutor to withdraw the charges are as old as the law itself. In some cases, dealing with trouble in a low key is far more productive of peace and satisfaction for individuals, families and neighbourhoods than an escalation of the conflict into a full-blown criminal trial. In resolving conflicts within the family, between landlords and tenants, businessmen and customers, or management and labour, citizens and police have always been reluctant to use the full force of the criminal law. This absorption of crime by the community, police screening of cases out of the criminal justice system, settling of incidents at the pre-trial level, or using sanctions other than imprisonment are examples of what is commonly referred to as diversion.

Underlying diversion is an attitude of restraint in the use of the criminal law. This is only natural for restraint in the use of criminal law is demanded in the name of justice. It is unjust and unreasonable to inflict upon a wrong-doer more harm than necessary. Accordingly, as an incident is investigated by police and passed along the criminal process an onus should rest upon officials to show why the case should proceed further. At different stages in the criminal justice system opportunities arise for police to screen a case from the system, the prosecution to suspend charges pending settlement at the pre-trial level or the Court to exercise discretion to withhold a conviction or to impose a sanction other than imprisonment. At these critical points within the criminal justice system, the case should not be passed automatically on to the next stage. The principle of restraint requires that an onus be placed on officials to show why the next more severe step should be taken.

Placing such an onus on officials would be a departure from existing law and practice in some respects, but it is completely in accord with reason and justice. Since all sanctions are imposed only at a cost in human and financial terms, it is reasonable that such costs should not be imposed needlessly. Instead of automatically proceeding from complaint to arrest to charge, trial, conviction and imprisonment, it makes sense to pause and justify proceeding to the next more serious and costly step. The amendments in the law of bail and provision for conditional or absolute discharge are in

part a recognition of the need to proceed with restraint and to justify further proceedings. Placing an onus on officials to justify proceeding to the next step gives effect to the principle of restraint, encourages diversion in appropriate cases and makes decision to divert visible and accountable.

2. How Broad is the Term “Diversion”?

From what has just been said the term diversion is used to cover programs serving a wide variety of functions:

- (1) *Community absorption*: individuals or particular interest groups dealing with trouble in their area, privately, outside the police and courts.
- (2) *Screening*: police referring an incident back to family or community, or simply dropping a case rather than laying criminal charges.
- (3) *Pre-trial diversion*: instead of proceeding with charges in the criminal court, referring a case out at the pre-trial level to be dealt with by settlement or mediation procedures.
- (4) *Alternatives to imprisonment*: increasing the use of such alternatives as absolute or conditional discharge, restitution, fines, suspended sentence, probation, community service orders, partial detention in a community based residence, or parole release programs.

When “diversion” is used to refer to such a wide range of functions as indicated above, care is needed in specifying just what type of diversion is under discussion. No one definition of diversion seems capable of comprehending everything done in its name. It is often said, for example, that diversion is designed to take or keep a case “out of” the criminal justice system. It can readily be seen, however, that this is not always so. In most diversion programs, the client or offender has at least entered the criminal justice system to the extent that the police take action or charges are laid. This is so even where the case is referred by police to such community agencies as hospitals, schools, or children’s services. Thus, some persons say that diversion is really any attempt to lessen or minimize contact between the offender and the criminal justice system. Hence, dispositions that serve as alternatives to jail are called “diversion”. In this sense diversion is hardly a directing “out of” or “from” the criminal justice system. Only where community organizations, institutions, families, or individuals deal with trouble privately, is there truly diversion “from” the criminal justice process.

Programs designed to improve the capacity of the individual, the family, the school or community to handle its own troubles may be more properly seen as “prevention”. A dispute, quarrel or other anti-social conduct should not always be looked upon as an excuse to use the criminal law or

even to refer a case to institutional health or welfare facilities. "Prevention" may often best be accomplished by programs that encourage and strengthen the citizen's or community's resources and capacities to deal with trouble on an informal basis outside the criminal justice, health or welfare systems.

While diversion has been used in some jurisdictions to refer to a policy of minimizing contact with the criminal justice system from arrest through bail, sentence of imprisonment and release on parole, the concern in this paper is with pre-trial diversion. The Working Paper on Imprisonment suggests guidelines for the exercise of restraint in the use of correctional facilities through sentencing and release procedures. As indicated in the next section, diversion operating privately in the community, the school, the shop, or the market place is really absorption or prevention, and as such related to, but outside of the criminal justice system. Police screening and pre-trial diversion are clearly within the scope of criminal dispositions and deserve special recognition at this time.

3. Diversion at what Stage?

(1) *The Community*

To the extent that they are intended to deal with cases without resorting to the criminal justice system at all, diversion programs tend to operate in the community as private systems. For many years, for example, professional bodies have had the power to discipline their own members for offences that could be termed criminal. In more serious cases the offence may be dealt with both by the professional body and the criminal courts. Universities and, above all, schools have a long history of bringing "in-house" offences before their disciplinary boards rather than calling in the police. Large businesses have private security forces and may deal with thefts, frauds and other damage as management problems without referring the matter to the courts. Housing developments, too, are turning to private security forces to handle an array of problems independently of the official criminal justice system. Indeed, private security forces now outpace the police in numbers and growth.

Private security forces, however, do not always absorb conflict or criminal incidents or deal with them independently of the criminal justice system. In some cases large institutions apprehend and investigate minor offences that take place on their premises but use the courts in order to get a final solution. The private security force ends up as a funnel to divert minor cases into the courts. In some cities such an organized use of the criminal courts by industrial or corporate persons adds considerably to the workload of the criminal justice system.

Organized attempts to use community based alternatives to the criminal justice system are becoming increasingly common and are used by police and

others as a means of diverting offenders from criminal processes. Detoxication centres, drug crisis centres, family crisis centres, youth service bureaus and various mental health clinics, among others, offer care, information, advice, counselling or referral services to people in trouble.

As already indicated, dealing with trouble privately is still the norm in our society. Furthermore, unless the power and interest of the state is to be greatly expanded into what has hitherto been regarded as the private realm, no case can be made for expanding criminal processes to include conflict resolution by institutions or private agencies. This is not to deny a public interest in knowing that these private systems operate fairly and are not oppressive to the individuals concerned.

(2) The Police

Police exercise their discretion to screen cases out of the criminal justice system. Very often this may be the case with juveniles or young offenders. It is not a new function for the police. They have always exercised a discretion not to lay a charge but take a youthful offender home to his parents and let him go with a warning. Similarly, in some driving offences, cases involving alcohol or drugs, incidents of disorderly conduct, or deviant behaviour suggesting mental illness, among others, the police have used their discretion to reprimand, counsel, mediate or settle cases, or to refer the incident out of the criminal justice system to health, welfare, or other agencies without further action being taken. Such screening is a recognition that the community does not always expect the police or others to deal with minor conflict or trouble through arrest and prosecution.

Is police discretion in screening cases out of the criminal justice system consistent with the ideal of equal justice under law? If A and B come to the attention of the police and the circumstances of the two are not distinguishable, then A and B should be treated alike. If A is screened out it would be unjust to proceed with charges against B unless different circumstances warrant a different disposition. In other words the decision to lay charges in one case and to screen out in the other must have some rational basis that will stand up to examination. The policies upon which the decisions are based should be stated publicly and followed in individual cases. Such policies should, as far as possible:

- (a) identify situations calling for charge rather than screening out;
- (b) establish criteria for the decision to charge rather than screen out;
- (c) require a charging option to be followed unless the incident can be screened out.

Situations that might well be screened out rather than dealt with by charge are identifiable from current police practices, and include among others:

- (a) incidents involving juveniles or the elderly;
- (b) family disputes;
- (c) misuse of alcohol or drugs;
- (d) incidents involving mental illness or physical disability;
- (e) nuisance-type incidents.

Criteria to be considered in deciding that a charge should or should not be laid might include:

- (a) The offence is not so serious that the public interest demands a trial.
- (b) The resources necessary to deal with the case by screening out are reasonably available in the community.
- (c) Alternative means of dealing with the incident would likely be effective in preventing further incidents by the offender in the light of his record and other evidence.
- (d) The impact of arrest or prosecution on the accused or his family is likely to be excessive in relation to the harm done.
- (e) There was a pre-existing relationship between the victim and offender and both are agreeable to a settlement.

The assumption is that police and prosecutors should continue to exercise discretion not to lay charges in proper cases, and that such use of discretion should be increased. The equal application of justice under law at this level should be encouraged through the development of express policies and criteria as indicated above. In the background, awaiting the outcome of decisions to charge or not to charge, is the court. It, too can have an influence on pre-trial practices so as to encourage equal justice under law. As indicated later, it is not suggested that the court should supervise or control prosecutorial policy. At the same time, should cases be presented to the court that do not appear proper for prosecution considering the express policies and criteria governing the laying of charges and prosecutions, the court would always be able to enter an absolute or conditional discharge. Thus, indirectly, the position of the court as a back-stop, so to speak, should encourage equal application of prosecutorial and police discretion in laying charges and prosecuting cases.

The Commission is well aware that to ask police forces to screen out cases according to stated policy and guides for decision is to break new ground. It may be difficult and frustrating in some cases to develop such policies or guides. Yet, if the administration of justice is to be visible, fair and accountable, there can be no turning away from this task. Clearly, if the policies and guides are to be workable and fit the reality of the local

community, police forces and crown prosecutors across the country should have an opportunity to share in their development.

The Commission is also aware that carrying out a screening policy with some degree of uniformity and consistency may require additional police resources. Whether the screening should be done at the police station level and whether the additional police manpower should have any special training or experience are questions that deserve consideration.

It should also be noted that if restraint in the use of the criminal process is to be successful at the police level, society must reward police for making screening decisions. At present the incentives and rewards open to police encourage the laying of charges, not screening out. Police forces are judged on their "clearance" rate – how many charges laid. Budgets tend to be tied to the notion of law enforcement and charges laid rather than the less visible social service and screening aspects of police work. Overtime is paid for appearing in court as a witness, and in some cases this can act as a considerable financial incentive to charging and keeping a case before the courts. Not only performance, budgets and payment for overtime but policies for promotion and advancement as well must be used so as to reward, to a greater extent than is now the case, police work and decision-making at the social service and pre-trial level.

(3) Pre-trial Diversion

Once a complaint has been laid and carried before a justice of the peace, he endorses the complaint thus converting it into an "information". It is the information which is the basis of the criminal prosecution. Under law, the prosecution of cases is under the control of the Attorney-General. The courts have very little control over decisions by the Crown to proceed with cases, to drop charges, to suspend charges or to enter a stay of proceedings. If the conduct of prosecutions leaves something to be desired, the remedy lies in public criticism in the press or in the legislature. The judicial branch, historically and constitutionally, has been kept separate from the executive branch of government in this respect.

It is the crown prosecutor, then, not the police, who has legal responsibility for laying charges and conducting prosecutions. In practice the day-to-day business of deciding whom to prosecute and on what charge is left to the police. Often the prosecutor will not know anything about a case until he walks into the courtroom and is handed a sheaf of cases for prosecution that morning. If he has time, considering the evidence and the law, he may then decide that the charge ought to be changed or the prosecution discontinued. For the most part, however, experienced police officers have developed a professional expertise in these matters that enables busy prosecutors to delegate to them the day-to-day decisions in laying charges. In

serious cases or cases otherwise raising a doubt, the police will consult the prosecution as to the correct charge. The existence of prosecutorial discretion to select cases for prosecution, to pick the appropriate charge, to vary or withdraw charges, delay or simply stay proceedings is not in doubt.

The principle of restraint should also apply at the prosecutorial level. The proposals for pre-trial settlement in this paper would encourage the Crown to exercise its traditional power to select cases for prosecution in court. While a charge has been laid, is it necessary that the further stages of trial, conviction and sentence be followed in every case? Can some cases be dealt with formally within the criminal justice system, at the pre-trial level, without going any further? On an *ad hoc* basis the Crown, in some areas does withdraw charges upon representations by lawyers for the defence indicating that the accused is deserving of leniency and has agreed to make restitution and pay back the harm done. Particularly where the victim is agreeable to such a disposition, the Crown may then decide that the public interest does not demand a prosecution and agree to drop the charges. Not only in cases of damage to property, but cases revealing an element of mental illness, very youthful or elderly offenders, or cases which under the circumstances are more a social dispute than a major criminal offence, may, with the consent of the victim and the prosecutor, be dealt with by way of settlement. The agreement by the offender in such cases may be to make restitution, to undergo counselling, treatment or to take up training, education or work programs for a stated period.

Such pre-trial settlement or intervention is consistent with the principle of restraint, but in the name of justice and equality deserves to be put on some rational and organized basis. This means that a policy of pre-trial intervention be publicly stated and that such policies, in so far as possible should:

- (a) identify situations calling for pre-trial intervention rather than trial; and
- (b) establish criteria for the decision to proceed to trial rather than to divert the case for settlement.

It is not likely that pre-trial settlements should be restricted to specific offences such as theft under \$200.00, shoplifting, and so on. The labels that we hang on offences frequently cover a very wide range of circumstances. For example, should a young man open his neighbour's door and remove a bottle of Scotch from the table, this is an offence of break and entry as well as theft. In all probability, however, the circumstances would not be so grave as to prohibit a pre-trial settlement providing the neighbour, offender and prosecutor were content with that type of disposition. It is even difficult to rule out offences of violence against the person, for the most common offence in this category is assault. As indicated by the research in East York,

in almost eighty percent of assaults the victim and offender knew each other either in a family context, or in a neighbour or acquaintance relationship. Other data shows that assaults often arise out of drinking or other social situations.

Particularly where there has been a prior relationship between the victim and offender and where such relationship is likely to continue despite the criminal event, pre-trial settlement or diversion may be appropriate. Indeed, the policy underlying pre-trial settlement should permit settlement without restriction as to specific offences, but impose a limitation in those cases where the public interest is so great that pre-trial settlement would depreciate the seriousness of the offence or the general preventive effect of the law.

Inevitably this will mean, to some extent, that in some areas of the country certain events will be thought proper for diversion while in others the same incidents may be proceeded with to trial. This can be objected to on the ground that it does not promote equal justice for all. It should be recognized, however, that equal justice is not an absolute to be pursued to the exclusion of all other values or considerations. If the resulting inequality is not gross it may be worthwhile to put up with it in order to secure other desirable objectives. One such objective in the criminal justice is to permit innovation. Probation, for example, was a direct result of such innovation by the judges and only later did the practice receive legislative recognition. Accordingly, some local variation in rather minor matters should be permitted despite its conflict with the ideal of equal justice under law. Under such a policy it is hardly conceivable that murder, rape, and robbery, for example, would be diverted to pre-trial settlement. The public interest in these types of cases is very high and, even if the victim and offender were agreed that under the circumstances such an offence could be dealt with without going to trial, other values would weigh in favour of public prosecution. The administration of justice is to some extent a local matter and ought to reflect local values and encourage innovation, but not at the expense of larger social interests.

In order that the decision to divert certain cases for settlement be visibly fair and accountable, however, criteria for guiding the pre-trial settlement decision should be developed. In most areas of the law affecting individual liberty or property, where it is possible and feasible to do so, the policies and criteria governing decision-making are articulated and written down. This becomes even more important should pre-trial settlement become an official part of criminal dispositions, as we recommend, and its administration is to be above charges of discrimination or partiality. If pre-trial settlement were made visible, and broad criteria of eligibility and procedure were introduced, risk of unequal exercise of discretion would be reduced. There would be a better understanding of why discretionary

decisions are made and the purposes of the criminal law would become more clear and satisfying to participants and observers alike.

The danger exists that in attempting to reduce practice to writing, the resulting guidelines will be unrealistic. This in turn may distort existing practices and produce pressures on officials to ignore the guidelines and return to their former practices. Experience with the Bail Reform Act is an illustration of the need to proceed with the help and experience of police and others in trying to capture discretionary practices and write them down as guides to future action.

In attempting to give express recognition to police or prosecutorial discretion not to proceed with a case, one problem arises from the nature of police and prosecution work itself. As with other institutions, criteria for decision-making are to some extent shaped by the internal workload, working conditions, and policies of the organization itself. Criteria for police or prosecution use in screening or diverting cases may not be particularly focussed on the victim as the Commission thinks they should be. Rather, the demand to get the job done on time, or to handle the case in such a way as to obtain recognition or promotion, reporting requirements, or the shortage of manpower may all have more effect on the decision to proceed with a case than the more ideal purposes of criminal justice. Another factor that may inhibit police in using discretion in this regard is the fear of public criticism that the discretion is exercised on an improper basis.

Keeping in mind the necessity for sound police screening practices, the need to give a role to victim and the community interests in dispositions and the need to take advantage of police and prosecutorial experience, the following factors may be useful in developing a set of guidelines for pre-trial diversion programs:

- (a) the incident being investigated cannot be dealt with at the police screening level;
- (b) the circumstances of the event are serious enough to warrant prosecution, and the evidence would support a prosecution;
- (c) the circumstances show a prior relationship between the victim and offender;
- (d) the facts of the case are not substantially in dispute;
- (e) the offender and victim voluntarily accept the offered pre-trial settlement as an alternative to prosecution and trial;
- (f) the needs and interests of society, the offender and the victim can be better served through a pre-trial program than through conviction and sentence;
- (g) trial and convictions may cause undue harm to the offender and his family or exacerbate the social problems that led to his criminal acts.

It should be emphasized that none of these criteria would affect the existing power of the prosecutor to withdraw charges or affect the power of the court to dismiss charges, should the prosecution be resumed, or to enter an absolute or conditional discharge.

(4) The Court

At a fourth stage the principle of restraint in using criminal processes and sanctions can be exercised by the judge. The court has a very wide power to impose a sentence other than imprisonment such as absolute or conditional discharge, restitution, fine and probation. In addition, other community based sanctions deserve consideration such as community service orders. While community based sanctions will be the subject of another Commission Working Paper, it may be useful to make one or two observations at this point. While judges may say that they do presently exercise restraint and imprison only as a last resort, it is difficult to assess that position. First of all in sentencing we have not developed good data collection. Judges do not get good statistical feedback on their sentencing practices, nor can they compare them with sentencing practices in neighbouring courts. For example, while we say that in cases of possession of marijuana few are prosecuted and almost none go to jail, yet in 1973, approximately 800 young persons were imprisoned for this offence in Canada. Thousands of others were not. What made the 800 cases an exception? Good data collection would enable us to give an explanation. Imprisonment is supposed to be used as a last resort, but the most recent published data by Statistics Canada, on an all-Canada basis showing imprisonment in cases of summary conviction under the Code is for 1968. It shows that for some assaults, obtaining food and lodging by fraud, and other minor offences, from 10 percent to 38 percent of dispositions were by way of imprisonment. Can the principle of restraint be made more effective by established policies, standards and guidelines for judges in sentencing, followed up by efficient data collection and feedback on sentencing practices?

In addition, isn't there room for sanctions enabling convicted persons to work, and in some cases to use part of the wages for restitution to the victim? If surveillance is necessary in some cases, can greater use be made of community residential centres and week-end detention so as to enable the offender to continue his job and maintain constructive links with the community?

At the court level the principle of restraint, as the Commission states in its Working Paper on Imprisonment, requires a more careful application, particularly in the use of imprisonment. In Canada there is a high rate of imprisonment compared to other countries. In addition, we usually send persons to prison not because of crimes of violence, but because of

convictions for property offences, offences against the public order or other offences not involving violence to the person.

Almost fifty percent of men imprisoned in provincial and federal institutions are imprisoned for non-violent offences against property. Most of these persons are young, unemployed or underemployed at the time of the offence and rather poorly educated. Among these non-violent offences, the average loss in individual offences is below \$200.00 and a \$500.00 "haul" represents a big case. About 50 percent of the victims in these property offences resulting in jail terms are not individuals but corporate bodies: businesses, schools, or institutions. Fourteen percent of first offenders convicted of a non-violent offence against property go to jail. Fifty percent of second offenders in this category go to jail.

At the same time we realize the limits of imprisonment in reducing recidivism. The deterrent effect of sanctions generally is perceived to be low and not surprisingly so when it is realized that in non-violent offences, the percentage of crimes cleared by police is low. The deterrent or educative effect of the criminal law is probably found in the certainty of arrest and publicity of the process rather than the increased severity of imprisonment as compared to a community based sanction.

If imprisonment is restricted to those whose crimes pose a serious risk to the life or limb of others, to those whose crimes are so reprehensible that deprivation of liberty is the only adequate response, or to those who refuse to pay fines or comply with other voluntary sanctions, then we must contemplate sentencing many more men to community based dispositions.

Such dispositions might well address themselves not only to the question of restitution to the victim and adequate supervision in the community but to the equally important question of upgrading the offender's economic and social skills. This will mean a substantial increase in the demand for community based health services, job training programs, work, counselling, residential and other social services. This is not to suggest that community based dispositions will greatly reduce crime, but simply to suggest it probably is less wasteful, less destructive of human dignity and more likely to bring improvement in individual cases than imprisonment. For the victim, community based dispositions should at least bring restitution and compensation, and society will likely find that its interests and security are reasonably protected as well.

If we are prepared to have an increase in community based dispositions, it becomes important to see whether community resources can handle this change in practice. Specifically, are there programs available in the community for supervising offenders in doing work such as cleaning up waste from public areas, assisting the elderly in clearing snow from sidewalks, and so on? Are there sufficient counselling services to give young people advice

and training in life skills, in making job applications and holding a job? Are there enough family counselling services, psychiatric services or job training programs?

Not only is there a need for the local community to do an inventory of its services and organized programs available to the court or police, there is a need as well to consider the adequacy of the delivery system. Is it enough simply to have an office downtown or a telephone number in the book? Are there sufficient personnel, volunteers as well as paid professionals, to see that these services are used to advantage by offenders?

4. Issues in Pre-trial Settlement

While the Commission is of the view that restraint in the use of the criminal law should be exercised at each of the four stages of the criminal process, particular attention in this Working Paper will be given to the relatively new suggestions for diversion in the form of pre-trial settlement.

This alternative disposition should be consistent with the values and principles set out in earlier Commission Working Papers, particularly Working Paper No. 3, The General Principles of Sentencing and Dispositions. One of the prime values society seeks to promote is the freedom and dignity of individual members of society. This value is promoted through law, including the criminal law which is called in by way of support only as a last resort. In using the criminal law, however, restraint is needed in order to maximize freedom and human dignity within society. Diversion is desirable to the extent that it maximizes such freedom and dignity, and it will tend to do so where the criteria already referred to are met and where the processes of the criminal law are used with restraint and directed towards the reconciliation of the offender with the victim and society. Finally, diversion should be formalized to the extent that it is necessary to achieve procedural fairness in the making of decisions to divert and to the extent that such decisions be visible and accountable.

In the light of these values and other considerations, the Commission offers the following outline as a basis for discussion.

While encouraging the development of sound police and prosecutorial discretion not to charge, there should also be room for mediation or settlement of some cases after charges have been laid. In all cases the court would be available as a backstop to divert through discharge those cases that may have been brought up for prosecution despite their apparent eligibility for pre-trial diversion.

Pre-trial settlement decisions ought to be under the control of the Attorney-General through the crown prosecutor. Since it is undesirable to build up another correctional bureaucracy at the pre-trial level, it is suggested

that once the decision to divert the case for settlement is made, the case be referred out to a community agency or service. It would be the responsibility of the agency to bring the victim and offender together and work out a suitable settlement. Preferably, the settlement should take the form of a written agreement or contract clearly setting out the terms to which the offender is bound. The agency would also be responsible for seeing that the contract was carried out and reporting to the prosecutor on the progress of the case. If the offender failed to carry out the agreement, the prosecutor would have to be satisfied that there was a wilful default and be prepared to make a decision to resume criminal proceedings against the offender. If the contract were satisfactorily performed, the prosecutor would withdraw the charges. On the basis of this proposed model some particular issues should be examined.

(1) Should a Charge be Laid?

If the criminal law processes are to be used with restraint, pre-trial settlement procedures should not depend on vague allegations of wrongdoing, delinquency or deviant conduct. As growth in pre-trial settlement programs continues, there is a real risk that police screening practices will be relaxed and large numbers of persons who formerly would have been dealt with outside the criminal justice system will now be brought into formal pre-trial diversion programs. Were this to happen it would be unfortunate. While the criminal justice system, including any proposed pre-trial settlement program, may have a general deterrent or a general preventive effect, its use for this purpose or for the purpose of rehabilitation must be exercised with restraint. Indeed, as indicated in earlier working papers, the best way of dealing with some offences may often be to do as little as possible. For this reason it would be unfortunate if pre-trial diversion were used as a means whereby a larger and larger proportion of people in trouble were discouraged from handling their own problems and encouraged or obliged to turn to state-run criminal justice programs.

One way to reduce court intake of minor offences would be to decriminalize certain offences. Yet to take certain conduct right out of the criminal law does not always result in a satisfactory solution. The objectionable conduct remains to be dealt with somehow by health or social welfare law, or by private suit in civil court or, perhaps, through insurance. To the extent that conduct does remain within the reach of the criminal law, however, one way of ensuring that pre-trial diversion schemes do not needlessly bring individuals into the criminal justice system is to require that a charge be laid.

The requirement of a charge would also make it easier to put teeth into a pre-trial settlement law. If the settlement agreement breaks down it may be desirable to resume criminal proceedings. Laying the charge prevents any

limitation date from running out, and the charge also lays the basis for informed consent.

(2) Should Consent be the Basis of Pre-trial Settlements?

Recognition of the inherent dignity of man and his capacity to make choices affecting his welfare, and the need for reconciliation between victim, offender and society require that pre-trial settlements be based on consent—the consent of the victim, that of the offender and of the Crown.

In the interests of justice, neither victims nor offenders should be denied the right to have the case go forward to the court. As a general rule the victim, as citizen, should not be denied his right to lay a private information even if the Crown does not think the case merits a public prosecution.

Even where prosecutorial policy is not to proceed with charges in certain types of cases, as in family quarrels, or shoplifting, for example, the complainant might still be left with the opportunity to lay a private information and proceed on his own in the criminal courts. Under present law, however, the Crown is able to take over or suspend such private prosecutions. In addition, unnecessary prosecutions may be tempered by the power of the court to grant an absolute discharge. The fact that restitution or settlement was offered by the offender, but refused, would thus be a factor to be considered in sentencing and dispositions.

Nor should an offender be denied the opportunity to plead not guilty and seek an acquittal in the courts. At the same time, serious cases should not be hidden from public prosecution simply because the victim and offender prefer a private settlement. The Crown in the public interest may well decide that the case is one that should be heard in the criminal court.

What kind of consent is adequate for a diversion program? Is it sufficient, as in probation and parole, to ask the offender whether he agrees to such a disposition without taking much time to explain what is involved? The extent to which safeguards might be expected in the matter of consent, must, in part, be measured against the risks involved or the rights to be waived by consent.

At present, if complaints of criminal wrong-doing are brought against an accused by police, he has a right to know specifically what offence is alleged; it is not enough to make vague references to delinquency or anti-social conduct. In addition, if the accused is arrested he has certain rights to bail, and if he is detained in custody he must be brought before a magistrate within twenty-four hours or within a reasonable time. Upon being questioned by police, the accused, in general, need not give answers but if he does, subject to the required warning about evidence being used against him,

there is no general right against self-incrimination. Accordingly, whereas the consent of the offender to enter into a diversion or settlement agreement makes sense from a correctional or rehabilitative point of view it carries important legal implications for the accused, particularly in so far as it may affect his right to a trial, or encourage him to waive his right to remain silent. In addition, under present law, despite any undertaking the Crown may give, any statements made in the course of the pre-trial settlement would probably be admissible in criminal proceedings at a later stage.

It goes without saying, that to be voluntary the choice should be made in full knowledge of the facts and of the possibility of charges being resumed should the accused not fulfil his obligations under the program. In other words, a pre-trial diversion program should be based on an intentional, intelligent and voluntary participation by the accused. It is probably not essential to the notion of fairness that an informed waiver of rights be made in open court; it is probably sufficient that the offender be fully advised of his rights in an informal out-of-court appearance.

It should also be fairly clear that a voluntary decision is more likely to be assured where the accused is advised by competent counsel. In this way, persons who feel that they were in no way responsible for the trouble or offence complained about might question the sufficiency of the evidence and avoid being pressured into settlement to avoid a criminal prosecution. No pressure should be put upon the accused to secure his entry into a pre-trial program but, realistically, it may be impossible to prevent persons consenting to a pre-trial program even though they may feel they have done no wrong. No doubt some persons plead guilty in criminal courts now, just to avoid the hassle and delay of a contested trial. Good police work, professional prosecutors and availability of defence counsel should reduce this risk to a minimum.

Objections can be raised against consent on the ground that the choice between pre-trial settlement or trial is not free but induced. The issue, though, is not whether the choice is "free" but whether the choice was presented under oppressive circumstances. It is not the offering of choices to an accused that arouses concern, but the offering of choices under oppressive or unconscionable circumstances.

(3) Should the Offender be Required to Admit Responsibility?

Entry into a pre-trial settlement program should not be conditioned upon an admission of "guilt", but on an informal admission of the facts alleged against him. While seeking a guilty plea may be explained as a means of getting the accused to accept his responsibility in the matter and hence an element in his rehabilitation, the same end may be achieved by less drastic means. All that is needed is an informal and out-of-court acknowledgement of

partial or full responsibility for the harm complained about. In addition, to require a pre-trial admission of "guilt" overlooks the fact that it is mediation and settlement, not adjudication, that is needed in some cases and that is why they are considered for pre-trial settlement in the first place.

(4) How are Cases to be Terminated?

If pre-trial settlement takes place after a charge is laid, the Crown is in control of the proceedings. It is the responsibility of the Crown then to decide whether or not a case has been successfully completed. If the settlement has been successfully completed, the charges should be withdrawn. While there is nothing in present law to require withdrawal of charges in such a case, in practice the prosecutor would, no doubt, give such an undertaking at the time the pre-trial option was offered to the offender. In this connection an amendment to the law barring prosecution on the same charges or the relaying of charges may help to engender confidence in the kind of pre-trial settlement proposed here. As indicated later, present law does nullify charges that are not proceeded with, but this in itself may not be a sufficient safeguard.

Unsuccessful cases may present greater problems. If the prosecutor is satisfied that the settlement contract has not been completed, what recourse should he have? First, as in fines, it is only in cases of wilful default that the issue of further sanctions should be of importance. Assuming an inexcusable default on the part of the accused, what should be done? Nothing at all? Should the contract be sued on as in civil cases? Or should the Crown resume criminal proceedings against the accused?

There is much to be said for doing nothing at all. Considering that a prior decision would already have been made that the case was not one of such general public importance as to warrant a criminal trial, how much weight should be placed on the fact that the offender does not keep his promises and has not made redress? The chances are probably 50-50 that he won't be heard from again in any criminal matter. If he is proceeded against, his very default is likely to be held against him at time of sentence and lead to a more severe sentence than the original offence may have warranted.

At the same time, there is much to be said for the view that an offender should not simply be allowed to get away with it. If something must be done, is it feasible to enforce the pre-trial settlement contract by using the civil courts? Those who have tried to sue defendants and collect damages in the civil courts may well be skeptical of the right to sue. Typically, offenders are men of little financial means, so that even if a default judgement were obtained, it might not be worth very much. In addition, unless the expense of suing in the civil courts were borne by the Crown, the costs would be a chilling prospect for most victims. Thirdly, the unfamiliarity with enforce-

ment procedures in the civil courts will doubtless act as a deterrent to some victims who then would be left "holding the bag". Offenders, realizing that the law has no teeth, would be tempted to abscond or pay little attention to their obligations under the pre-trial settlement agreement.

Simply doing nothing or relying on civil enforcement does not seem to be satisfactory. While compliance with pre-trial settlement contracts may be expected in the majority of cases, some offenders will not discharge their obligations unless they are made to. In probation, this problem has usually been met in two ways. Wilful failure to comply with the terms and conditions of an order is itself a separate offence, alternatively the defaulting offender can be re-sentenced on his original conviction. On balance, the option of resuming criminal proceedings in the event of a wilful breach of a pre-trial settlement order would probably be desirable.

If proceedings are to be resumed in such a case, what provision should be made for those cases where the offender denies he was in default? In parole, at present, a parole contract may be terminated by the Parole Board and no reasons need be given. As the Commission makes clear in its Working Paper on Imprisonment, however, release procedures having a direct effect on the liberty of the offender ought to be taken fairly. It follows that the decision to terminate a pre-trial settlement contract and to resume criminal proceedings should also be seen to be fair. Among other things, this should mean providing reasons for the termination when requested, and permitting a challenge to the factual basis upon which the decision to terminate was made. In practice, such provisions for fairness are not likely to mean substantial delays in proceeding with cases. As in parole, most offenders are likely to be well aware of any difficulties that may be developing in respect of the pre-trial order and will probably have had various warnings from a supervising officer before the decision to terminate is made.

(5) Is there "Double Jeopardy"?

Where breach of a pre-trial settlement order is followed by a decision to terminate the order and resume criminal proceedings, does the offender stand in double jeopardy? Acknowledging that there are various aspects to "double jeopardy", it can hardly be said that to resume criminal proceedings in such circumstances violates the notion that a man should not be charged twice for the same offence. Instead, it is a case of suspended charges being resumed.

What would be regarded as unfair and contrary to public policy would be a resumption of criminal proceedings following a successful completion of a settlement or diversion order. Should such a travesty of justice take place there is probably nothing in existing law to remedy it, except the jurisdiction inherent in the court to prevent an abuse of its process. It is doubtful, however, whether the courts have extensive authority to supervise prosecu-

torial practices to forestall a miscarriage of justice and to secure the confidence of accused persons contemplating diversion. As indicated earlier, there should be a legislative statement providing for a withdrawal of charges and barring further prosecution for that offence once the pre-trial diversion program is successfully completed.

(6) Is there a Right to a Speedy Trial?

If charges are laid but suspended during the course of a pre-trial program, can the offender complain that he is being denied his right to a "speedy" or early trial? Such a complaint is difficult to imagine where the accused has voluntarily chosen to enter into the very program that was designed as an alternative to trial. Unlike the United States, Canada offers no constitutional right to an early trial. The law, however, does encourage prosecutors to get on with a case involving a stay of proceedings, for the stay is limited.

(7) Will the Rules of Evidence Apply at Pre-trial Settlements?

To the extent that the rules of evidence are designed to keep some kinds of evidence out of the court, there should be no problem. These rules are useful in the adversary process of the court battle but in a mediation or settlement procedure they may find less rigid application. Other adjudicative or settlement forums in labour law, family law or administrative law do not appear to have much trouble in determining what evidence is relevant and material to the issues at hand without getting caught up in the formal rules, or hopelessly lost in irrelevancies.

To the extent that the rules of evidence would permit statements made in the course of a pre-trial settlement to be used against the accused in later criminal proceedings, there is cause for concern. If the policy of the law is to encourage settlements and the keeping of promises, it ought not to be undermined by an unrestricted rule permitting admissibility of statements made in the course of a settlement. This may be ensured by leaving a discretion with the judge to exclude evidence under certain circumstances as outlined in the Commission's Working Papers on Privilege in the law of evidence.

(8) Will the Accused in a Pre-trial Settlement Have a Criminal Record?

It is essential to distinguish between what police do in order to keep track of convictions and what employers and others do in asking "do you have a criminal record? ". Most persons would concede that it is useful to the administration of justice for police to keep a record or file showing persons convicted in the courts and that information showing previous convictions

should be available at time of sentence. On the other hand, many people do think it undesirable to discriminate against a person in employment or business practices generally, simply because, at one time, he or she was convicted of an offence.

In pre-trial settlements it will only be common sense to collect basic data on the cases that are dealt with. This does not mean that discrimination in employment practices, for example, should be ignored. Accordingly, the laws relating to criminal records should be reviewed to take into account those persons who may have been charged but diverted to a pre-trial settlement.

(9) How to Assure Equal Consideration in Diversion?

How can equal consideration in diversion be assured? What assurance does an accused have that his case has been fairly and properly considered for pre-trial settlement? Rather than think in terms of a "right" to diversion, it may be more helpful to consider the position of the accused at sentence generally. For example, for years the policy of the law has been to encourage the use of probation, particularly in the case of first offenders. This does not give the first offender a "right" to probation, but the policy does require the judge to consider probation as an alternative to imprisonment and does require that a decision to impose imprisonment in such a case be justifiable.

Dispositions, whether pre-trial or after conviction, should be made openly according to stated policy and within express guidelines. In this way decisions become open and accountable. They are made accountable in the sense that the decision may be challenged as being inconsistent with the stated policy or guidelines or made in complete disregard of them. That is, the decision should be open to review, much as some parole and correctional decisions should be open to review.

(10) Should Pre-trial Settlements be Conducted in Public?

One of the great assets of our system of law is that trials must be public. Some inroads have been made on this principle in cases of juvenile delinquency and reporting is restricted in some other circumstances. On the other hand, pre-trial negotiations have usually been conducted behind closed doors. A pre-trial settlement, however, involving as it does some stigma and some acceptance of responsibility in the face of a criminal charge, is not a run of the mill pre-trial procedure. The public are entitled to know what harm was done not only to the victim but also to the community. To this extent it is necessary that the circumstances be made public knowledge. It can be said, too, that a public hearing is necessary in order to make sure that the offender or victim is being treated fairly in the settlement process.

While a great deal of weight must be given to the view that decisions be open, visible and accountable, it does not necessarily follow that the actual

process of settlement be conducted in public. The decision to divert to settlement should be public and accountable. Yet the actual working out of the agreement can hardly be done under the glare of television cameras. In labour law and family law, settlements are usually arrived at in lawyers' offices or in some semi-private atmosphere. The decision whether or not to divert those cases involving a high public interest would be a public one. Once the case is designated as suitable for pre-trial settlement, however, it is difficult to see a high public interest in the actual give and take of the settlement process. Since the proposed scheme also depends upon the consent of the victim and offender and contemplates the availability of counsel, it is not likely that individuals could be abused by a settlement arrived at in the semi-private atmosphere of a voluntary agency, for example. On balance, therefore, the Commission is of the view that the decision to divert to pre-trial settlement be open, visible and accountable, but that the actual mediation or settlement process be permitted some degree of privacy.

(11) Will Diversion Programs Save Us Money?

The claim is frequently made that diversion is cheap. It is said to be cheaper to use a pre-trial settlement than to proceed to court and conviction. It is said that it is cheaper to use a community based sanction such as probation than to use imprisonment. Such arguments sound plausible. Yet the difficulty of accurately assessing the cost of any program or service in criminal justice is great.

Certainly diversion programs, if they are to be successful, will require the expenditure of large sums of money in new areas, while reducing the demand for services in other parts of the criminal justice system. More money will have to be spent on justice training programs for one thing and increasing staff at the prosecutor's office. Increased demands will be made upon the community for services including probation, child welfare, family counselling, manpower training, special education of different kinds, and medical or health services. Already, probation, for example, or counselling through drug and alcoholic addiction agencies in some communities are overloaded.

To some extent increased manpower requirements in some of these services may be met through increased use of volunteers. Yet volunteers need places to work, professionals to assist and give guidance and resources to work with.

Diversion programs will not solve the problems that lead some people to crime; it will only make it possible to see those problems more clearly and come to grips with them at the community level. Diversion makes it possible for our responses to crime to be more rational, informed, open and selective. Yet it all depends on governments supporting the community and its agencies to make that intelligent response in a timely way.

Conclusion

The continuing interest in diversion is fed by many sources. There is a growing disappointment with an over-reliance on the criminal law as a means of dealing with a multitude of social problems. At the same time we realize that rehabilitation does not provide a full answer to the problem of crime. Increasingly, it is recognized that crime has social roots and sentencing policies must take into account not only the offender but the community and the victim as well.

As research throws more and more light on what actually happens in the name of criminal law, it becomes clear that the court and correctional processes are not able to deal well with many of the cases brought to their doors. The adversary processes of the court are not able to deal adequately with cases that require mediation or settlement. The correctional institutions cannot easily offer services and help that is community based. The victims and offenders and witnesses who are exposed to the criminal processes frequently find them impersonal, frustrating and difficult to understand.

Research also makes it clear that most of the conflict or trouble that could be called "criminal" often is absorbed by the family, the school, the place of work or other branches of community life. Police work is deeply involved in diversion, in finding health and social service solutions to problems that might otherwise end up in courts. Prosecutors have a wide discretion to decide that certain cases be settled at the pre-trial level rather than automatically processed for trial. Increasingly, these practices and others are being given formal encouragement through official programs and projects or through legislation.

There is a need to examine diversion then, not only because it is already upon us and is often the norm but also because diversionary practices can give rise to greater satisfaction between victims and offenders. The general peace of the community may be strengthened more through a reconciliation of the offender and victim than through their polarization in an adversary trial. To put the matter another way, there is a need to examine diversion at this time if only to discover again that there is much value in providing mechanisms whereby offenders and victims are given the opportunity to find their own solutions rather than having the state needlessly impose a judgment in every case.

For these and other reasons, diversion programs have grown up without much direction or control in various jurisdictions and are currently the centre of attention. Yet, in so far as diversion is seen to be an alternative to imprisonment, it may be an illusion. As indicated in the Commission's Working Paper on Imprisonment, if we are to reduce the jail population many property offenders now being imprisoned will have to be sentenced to alternative community based dispositions. Many diversion programs, however, are located at the pre-trial level and are directed to juveniles or young offenders involved in delinquency or near-delinquency that ought not to warrant imprisonment in any event.

Diversion is also seen by some persons not only as a means of reducing imprisonment but also of keeping offenders out of the criminal system in the first place. This, too, may prove to be an illusion unless the principle of restraint is exercised. Under existing law and practice, incidents involving delinquency or other minor trouble are absorbed by the community or dealt with by police and prosecutors without charges being laid or without going to trial. The cases are screened out; they are referred to parents, agencies or hospitals or they are settled informally and are not characterized as criminal in nature. The danger is, then, that thoughtless development of diversion programs will have the opposite effect to that which is intended: they will result in greater, not less, exposure to the criminal justice system. Accordingly, it will be important to ensure that diversion to pre-trial settlements draws upon cases that would otherwise have gone to court. Even then there is a danger that pre-trial diversion will attract only cases that otherwise would have been dealt with by dismissal, conditional or absolute discharge or probation.

The diversion to pre-trial settlement of some young persons would provide an opportunity to engage them in paying restitution, as well as involving them in job training, employment, counselling or training in "life skills" that so many of them lack. As an additional benefit, diversion encourages the community to participate in supporting the criminal justice system to a degree that was not always possible under the trial model. Professionals, para-professionals, ex-offenders and ordinary citizens are encouraged to join the delivery of services to the criminal justice system, for the diversion programs rest upon a community base.

An advantage of diversion procedures is the scope they offer for participation by the victim in resolution of the trouble or harm complained about. If there has been a continuing relationship between victim and offender as is the case in many crimes against the person or property, a procedure which enables the parties to come together and with the help of a mediator arrive at a mutually satisfactory settlement is to be preferred in some cases to the adversarial nature of the court trial.

As already indicated, setting up diversion programs will entail risks. Unless police and prosecutorial screening practices are understood and made visible, there will be the temptation to divert for pre-trial settlement difficult cases that would otherwise have been dealt with without charging. It is important, therefore, that diversion be firmly grounded on sound sentencing principles and governed throughout by the principle of restraint with the onus on officials to justify proceeding with a case to the next more serious level.

Despite the risks involved, the advantages of a pre-trial diversion or settlement mechanism from the point of view of society, the victim and the offender alike warrant encouragement. A pre-trial program, based upon the consent of the parties, operating according to stated policies and express guidelines for decision, and run under the supervision of the prosecution by competent administrators supported by community service programs is recommended. Fairness in procedure is important and to this end it is recommended that the procedures be open and accountable. Counsel should be available to ensure that accused persons fully understand what they are consenting to.

Undoubtedly, legislation would encourage the development of pre-trial diversion programs, although other means such as policy statements or declarations of intent may also serve this purpose. In any event, it is clear that it is useful to gather as much experience as possible before being fully satisfied with any such official statements of policy and direction. In addition, diversion will make a heavy call upon community services and will require increases in personnel and budgets.

To conclude, it appears that the criminal law and its processes are a last and limited resort in dealing with social conflict. When it is called upon to deal with conflict and trouble, the criminal law and its sanctions should be used with restraint, and decisions to proceed with criminal processes should be fair, visible and accountable.

